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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN RE OPENDOOR TECHNOLOGIES
INC. SECURITIES LITIGATION

Case No. 2:22-CV-01717-MTL

**MEMORANDUM OF LAW IN
OPPOSITION TO OPENDOOR
DEFENDANTS' MOTION FOR AN
ORDER DIRECTING THE
SUBMISSION OF COUNSEL AND
CONFIDENTIAL WITNESS
AFFIDAVITS**

CLASS ACTION

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1 Lead Plaintiffs Indiana Public Retirement System, Oakland County Employees’
2 Retirement System, and Oakland County Voluntary Employees’ Beneficiary Association
3 (“Lead Plaintiffs”) and Additional Plaintiff Stuart Graham Hereford (“Additional Plaintiff”
4 and together with Lead Plaintiffs, “Plaintiffs”), respectfully submit this Memorandum of
5 Law in Opposition to Opendoor Defendants’ Motion for an order directing the submission
6 of counsel and confidential witness (“CW”) affidavits.¹ Defendants’ Motion is without
7 merit and the relief sought should be denied.

8 **I. INTRODUCTION**

9 Faced with the particularized allegations in the Complaint, Opendoor and its counsel
10 contacted the CWs referenced in the Complaint and induced four of them to sit for
11 unofficial, non-transcribed interviews. Yet, none of the CWs have submitted a declaration
12 recanting or even questioning any of the allegations attributed to them in the Complaint.
13 To this day, none of the CWs have contacted Lead Counsel or its investigators to question
14 any facts attributed to them. Only after being contacted by Defendants’ counsel and asked
15 a series of self-serving and leading questions did any CW purportedly take issue with their
16 attributed accounts. According to Defendants’ counsel’s interpretation of their own
17 interviews, they now claim—for the first time—not that the alleged statements were false
18 or inaccurate, but that a handful of CW allegations in the Complaint were incomplete or
19 “taken out of context.” Based on this, Defendants now urge the Court to order Lead
20 Counsel and the challenged CWs to submit sworn affidavits, i.e., engage in pre-motion to
21 dismiss discovery. *See* Motion at 15-16. The Court should swiftly reject this request, as
22 similar tactics have been repeatedly rejected by courts in this Circuit and elsewhere.

23 As an initial matter, Defendants’ Motion violates Rule 12(b) of the Federal Rules of
24 Civil Procedure, as these types of disputes are clearly factual disputes that are not
25 appropriate to resolve at the motion to dismiss stage. *See Union Asset Mgmt. Holding AG*

26 ¹ Capitalized terms herein have the same meaning as set forth in the Consolidated
27 Amended Complaint for Violations of the Federal Securities Laws (ECF No. 39) (the
28 “Complaint”). Citations to “¶ __” refer to paragraphs of the Complaint. References to
“Motion at __” are to Opendoor Defendants’ Motion for an order directing the submission
of counsel and confidential witness affidavits (ECF No. 57).

1 *v. Sandisk LLC*, 227 F. Supp. 3d 1098, 1100 (N.D. Cal. 2017) (“*Sandisk*”). Indeed, “while
2 a district judge is considering a motion to dismiss, there is a strong argument that
3 defendants should never be submitting recanting declarations, and that courts should be
4 striking any such declarations sight unseen.” *Id.* at 1101. At most, Defendants’ Motion
5 boils down to credibility issues which must be assessed by the trier of fact *after* there has
6 been an opportunity for full and fair discovery on these issues, as it would be “clearly []
7 inappropriate for the Court to simply treat [Defendants’] declaration as true” at the pleading
8 stage. *Id.* at 1099.

9 Defendants’ Motion also violates the Private Securities Litigation Reform Act
10 (“PSLRA”). In all actions arising under the PSLRA, “all discovery and other proceedings
11 shall be stayed during the pendency of any motion to dismiss.” 15 U.S.C. §78u-4(b)(3)(B).
12 Defendants’ Motion is nothing more than a unilateral attempt to obtain pre-motion to
13 dismiss discovery, which is improper. Courts in this Circuit and elsewhere routinely reject
14 such attempts because they involve contested issues of witness credibility and factual
15 disputes that cannot be considered at the motion to dismiss stage, and these courts
16 recognize that any perceived differences in witness interviews should be viewed
17 skeptically, as they are regularly disproven during discovery and shown to be the product
18 of actual, perceived, or anticipated retaliation or other repercussions from that witness’s
19 former employer. *See e.g., Hatamian v. Advanced Micro Devices, Inc.*, 2015 WL 511175,
20 at *2 (N.D. Cal. Feb. 6, 2015) (“*AMD*”); *see also* Section III(A)(1) (collecting cases).

21 There are strong reasons to follow these in-circuit precedents here. Unlike the facts
22 in the out-of-circuit cases Defendants rely on, this is not a case where the CWs claim that
23 they never spoke to Lead Counsel, nor is this a case where the CWs spoke only to hired
24 investigators and not directly to the attorneys and employees of Lead Counsel. Indeed, this
25 is not even a case where the CWs are recanting or disavowing their previous statements.
26 To the contrary, Defendants do not even dispute that the CWs here knowingly and
27 voluntarily spoke to Lead Counsel. Lead Counsel and its investigators told each witness
28 that they were investigating potential securities law violations against the CW’s former

1 employer, Opendoor, and each CW voluntarily spoke to Lead Counsel’s investigators and
 2 attorneys after learning that information. As discussed in Section II, Lead Counsel gave
 3 each challenged CW the opportunity to confirm the accuracy of the statements that would
 4 be attributed to them well before the Complaint was filed. And following the filing of the
 5 Complaint, Lead Counsel sent each CW, via Federal Express, a copy of the Complaint.
 6 Yet, not a single CW has ever contacted Lead Counsel or its investigators to clarify or
 7 dispute any statements attributed to them. Even now, none of the CWs have submitted a
 8 declaration recanting or questioning any statement attributed to them.

9 Therefore, Defendants’ Motion should be denied in its entirety.

10 **II. FACTUAL BACKGROUND**

11 Lead Counsel Labaton Sucharow LLP (“Lead Counsel” or “Labaton Sucharow”)
 12 undertook an extensive pre-filing investigation concerning the circumstances and facts
 13 surrounding this case. *See* Complaint at 2. Lead Counsel’s investigation included, among
 14 other things, interviewing former employees of Opendoor. *Id.* Lead Counsel and its team
 15 of in-house investigators (“Labaton Investigators”) conducted those interviews pursuant to
 16 internal policies designed to ensure that each statement included in the Complaint
 17 attributed to a CW accurately reflects information provided by that CW. *See* Declaration
 18 of James T. Christie (“Christie Decl.”) at ¶¶3-10.

19 **A. Lead Counsel’s Contact with CW 2²**

20 Labaton Investigators and two Labaton Sucharow attorneys contacted CW 2 by
 21 phone on April 3, 2023. *Id.* at ¶12. Before any substantive questions were asked, a Labaton
 22 Investigator identified herself and two Labaton Sucharow attorneys, confirmed that CW 2
 23 did not work at Opendoor, and explained that Labaton Sucharow was investigating
 24 securities law violations against CW 2’s former employer, Opendoor. *Id.* Labaton
 25 Investigators took detailed and contemporaneous notes during the call. *Id.*

26 On April 14, 2023, Labaton Investigators and Labaton Sucharow attorneys
 27 conducted a confirmatory call with CW 2 to go over every statement that would be

28 ² Consistent with the Complaint, all CWs are described using feminine pronouns.

1 attributed to CW 2 in the Complaint. *Id.* at ¶13. A Labaton Investigator read every
2 statement and CW 2 confirmed the accuracy of every statement. *Id.* Lead Counsel made
3 any minor clarifications requested by CW 2. *Id.* During the confirmatory call, Labaton
4 Investigators informed CW 2 that her statements would be used in the Complaint and that
5 she would be identified as a CW. *Id.* CW 2 did not object to being a CW or having her
6 statements used in the Complaint. *Id.*

7 On April 19, 2023, Labaton Investigators mailed a copy of the filed Complaint via
8 FedEx to CW 2. *Id.* at ¶15. CW 2 did not contact Lead Counsel or Labaton Investigators
9 following receipt of the Complaint, nor did CW 2 otherwise assert at any time that any
10 statements attributed to her in the Complaint were not accurate or were misleading or taken
11 out of context. *Id.* at ¶16.

12 **B. Lead Counsel's Contact with CW 5**

13 A Labaton Investigator contacted CW 5 by phone on October 18, 2022. *Id.* at ¶17.
14 Before any substantive questions were asked, the Labaton Investigator identified himself,
15 confirmed that CW 5 did not work at Opendoor, and explained that Labaton Sucharow was
16 investigating securities law violations against CW 5's former employer, Opendoor. *Id.* The
17 Labaton Investigator took detailed and contemporaneous notes during the call. *Id.*

18 On April 4, 2023, Labaton Investigators and Labaton Sucharow attorneys conducted
19 a confirmatory call with CW 5 to go over every statement that would be attributed to CW
20 5 in the Complaint. *Id.* at ¶18. A Labaton Investigator read every statement and CW 5
21 confirmed the accuracy of every statement. *Id.* Lead Counsel made any minor clarifications
22 requested by CW 5. *Id.* During the confirmatory call, a Labaton Investigator informed CW
23 5 that her statements would be used in the Complaint and that she would be identified as a
24 CW. *Id.* CW 5 did not object to being a CW or having her statements used in the Complaint.
25 *Id.*

26 On April 19, 2023, Labaton Investigators mailed a copy of the filed Complaint via
27 FedEx to CW 5. *Id.* at ¶20. CW 5 did not contact Lead Counsel or Labaton Investigators
28 following receipt of the Complaint, nor did CW 5 otherwise assert at any time that any

1 statements attributed to her in the Complaint were not accurate or were misleading or taken
2 out of context. *Id.* at ¶21.

3 **C. Lead Counsel's Contact with CW 6**

4 A Labaton Investigator contacted CW 6 by phone on November 17, 2022. *Id.* at ¶22.
5 Before any substantive questions were asked, the Labaton Investigator identified himself,
6 confirmed that CW 6 did not work at Opendoor, and explained that Labaton Sucharow was
7 investigating securities law violations against CW 6's former employer, Opendoor. *Id.* The
8 Labaton Investigator took detailed and contemporaneous notes during the call. *Id.*

9 On April 4, 2023, Labaton Investigators and Labaton Sucharow attorneys followed
10 up and conducted a confirmatory call with CW 6 to go over every statement that would be
11 attributed to CW 6 in the Complaint. *Id.* at ¶23. A Labaton Investigator read every
12 statement and CW 6 confirmed the accuracy of every statement. *Id.* Lead Counsel made
13 any minor clarifications requested by CW 6. *Id.* During the confirmatory call, a Labaton
14 Investigator informed CW 6 that her statements would be used in the Complaint and that
15 she would be identified as a CW. *Id.* CW 6 did not object to being a CW or having her
16 statements used in the Complaint. *Id.*

17 On April 19, 2023, Labaton Investigators mailed a copy of the filed Complaint via
18 FedEx to CW 6, however, the Complaint was sent back. *Id.* at ¶25. As a result, Labaton
19 Investigators sent CW 6 an email in early May 2023 attaching a copy of the Complaint. *Id.*
20 CW 6 did not contact Lead Counsel or Labaton Investigators following receipt of the
21 Complaint, nor did CW 6 otherwise assert at any time that any statements attributed to her
22 in the Complaint were not accurate or were misleading or taken out of context. *Id.* at ¶26.

23 **D. Lead Counsel's Contact with CW 8**

24 On April 4, 2023, a Labaton Investigator contacted CW 8 by phone. *Id.* at ¶27.
25 Before any asking any questions, the Labaton Investigator identified himself, confirmed
26 that CW 8 was not currently employed by Opendoor, and explained the purpose of the call.
27 *Id.* At the end of the call, the Labaton Investigator explained to CW 8 that he would
28 memorialize their conversation for Labaton Sucharow attorneys working on the case, and

1 told CW 8 that the attorneys may have follow up questions. *Id.* CW 8 stated that she was
 2 fine with such a follow up call. *Id.* The Labaton Investigator took detailed and
 3 contemporaneous notes during the call. *Id.*

4 The Labaton Investigator and Labaton Sucharow attorneys attempted to call CW 8
 5 for a follow-up on April 10, 2023. *Id.* at ¶28. CW 8 did not answer, and thus, the Labaton
 6 Investigator left a voicemail on April 10, 2023, advising CW 8 that she would be a CW in
 7 the Complaint and that Lead Counsel would like to confirm the statements that would be
 8 attributed to her in the Complaint. *Id.* CW 8 did not respond, and on April 11, 2023, a
 9 Labaton Investigator sent CW 8 a letter stating that the enclosed statements were being
 10 attributed to her in the Complaint against Opendoor. *Id.* at ¶¶28-29. CW 8 did not try to
 11 reach out to Lead Counsel or Labaton Investigators. *Id.* at ¶30. After filing the Complaint,
 12 Lead Counsel sent CW 8 a copy of the Complaint, which was delivered on April 21, 2023.
 13 *Id.* CW 8 did not contact Lead Counsel or Labaton Investigators following receipt of the
 14 Complaint, nor did CW 8 otherwise assert at any time that any statements attributed to her
 15 in the Complaint were not accurate or were misleading or taken out of context. *Id.* at ¶31.³

16 **III. ARGUMENT**

17 **A. Defendants' Motion is Procedurally Improper**

18 Defendants' challenges to the veracity of the accounts of four CWs detailed in the
 19 Complaint raise contested factual questions that are not properly resolved at the pleading
 20 stage under the Federal Rules of Civil Procedure and PSLRA.

21 **1. Defendants' Motion Violates Rule 12(b) of the Federal Rules of** 22 **Civil Procedure**

23 The reason Defendants seek to side-step the PSLRA and engage in one-way
 24 discovery at this time is clear: they seek to contradict or chip away at the Complaint's well-

25 ³ Defendants comment that they spoke to CW 1 but terminated the phone call when
 26 CW 1 told them that she is represented by counsel. *See* Motion at 5 n.2. However,
 27 Defendants fail to mention that after being told by CW1's counsel that the allegations
 28 attributed to CW 1 were accurate and that she confirmed the accuracy of her statements to
 Lead Counsel prior to the filing of the Complaint, Defendants' nonetheless re-contacted
 CW 1's counsel, citing CW 1's employment agreement to pressure CW 1 into cooperating,
 even sending a Zoom meeting invite to CW 1 through her counsel. Christie Decl. at ¶32.

1 pled factual allegations in connection with their pending motion to dismiss. This is
 2 improper. While the PSLRA requires Plaintiffs plead their claims with particularity, it does
 3 not alter certain basic standards at the pleading stage. The plain text of Federal Rule of
 4 Civil Procedure 12(d) is clear and unambiguous:

5 If, on a ***motion under Rule 12(b)(6)*** or 12(c), ***matters outside the***
 6 ***pleadings are presented to and not excluded by the court, the motion***
 7 ***must be treated as one for summary judgment under Rule 56.*** All
 8 parties must be given a reasonable opportunity to present all the
 material that is pertinent to the motion. Fed. R. Civ. P. 12(d)
 (emphasis added).

9 Defendants have not requested that the Court treat their motion as one for summary
 10 judgment, and as such, Rule 12 stops Defendants’ quixotic quest to have the Court consider
 11 extraneous material with their motion to dismiss.

12 Moreover, the Supreme Court has held that, when “faced with a Rule 12(b)(6)
 13 motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure
 14 to plead a claim on which relief can be granted, accept all factual allegations in the
 15 complaint as true.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).
 16 In reversing dismissals of Exchange Act claims, the Ninth Circuit has likewise emphasized
 17 the “prohibition against resolving factual disputes at the pleading stage.” *Khoja v. Orexigen*
 18 *Therapeutics, Inc.*, 899 F.3d 988, 1003 (9th Cir. 2018). As the Ninth Circuit explained,
 19 “[i]f defendants are permitted to present their own version of the facts at the pleading
 20 stage—and district courts accept those facts as uncontroverted and true—it becomes near
 21 impossible for even the most aggrieved plaintiff to demonstrate a sufficiently ‘plausible’
 22 claim for relief.” *Id.* at 999.

23 Defendants’ Motion improperly urges the Court to do exactly what *Khoja*
 24 proscribes: accept Defendants’ characterization of extrinsic evidence (the Anhang
 25 Declaration) to resolve a factual dispute against Plaintiffs’ well-pled allegations. However,
 26 that is not proper at this stage. Defendants will have the opportunity to test the CWs’
 27 credibility during discovery. Indeed, it “will fall ***within the jury’s authority to assess the***
 28

1 *credibility of witnesses [and] resolve genuine issues of fact*” *Tellabs, Inc.* 551 U.S.
2 at 311 (emphasis added).

3 Courts in this Circuit have consistently rejected similar attempts to engage in pre-
4 motion to dismiss discovery with respect to CW allegations. For example, in *AMD*,
5 defendants filed a motion to strike the accounts of two confidential witnesses contained in
6 a securities class action complaint. 2015 WL 511175 at *1. Defense counsel there obtained
7 declarations from the CWs who suddenly denied making the statements attributed to them
8 in the complaint. Citing the same out-of-circuit cases Defendants do here, defense counsel
9 in *AMD* filed a motion to strike the CW allegations. *Id.* However, the court squarely
10 rejected defendants’ tactic (as well as their accompanying motion to dismiss). *Id.* In
11 denying the motion to strike, the court held that the appropriate time to explore the
12 confidential witnesses’ denials was during discovery, which “will provide the parties an
13 opportunity to explore these questions further, specifically in depositions at which both
14 parties—and a court reporter—may be present.” *Id.* at *3.

15 In its order, the *AMD* court further recognized reasons that “undermine[d] the
16 probative value of the declarations offered by defendants” and, simultaneously, reasons to
17 trust the witnesses’ accounts described in the complaint. *Id.* at *2. Specifically, just like
18 here, the former employees cited in the *AMD* complaint read the pleading “before the
19 claims of inaccuracy or misattribution surfaced” and raised their purported concerns “only
20 *after* defendants had contacted [them].” *Id.* (emphasis added). The reasons for the
21 witnesses’ disavowals, the court reiterated, raised disputed factual “questions [that] are
22 more appropriately raised in the context of summary judgment after the benefit of full
23 discovery, or for consideration by a jury.” *Id.*

24 Similarly, in *Sandisk*, the defendants moved to dismiss the complaint with prejudice,
25 submitting a “‘recanting declaration’ in which [the CW] allege[d] he did not make some of
26 the statements attributed to him.” 227 F. Supp. 3d at 1099. The court refused to consider
27 the recanting declaration, explaining “[i]t would clearly be inappropriate for the [c]ourt to
28 simply treat the declaration as true” at the pleading stage. *Id.* As the *Sandisk* court properly

1 recognized, “[the CW’s] declaration testimony . . . might be false, because the witness feels
 2 intimidated by the defendants.” *Id.* For example, the CW might, “after being approached
 3 by [the company], have become concerned that he overstated his knowledge to the
 4 plaintiffs’ investigator, and he might now be overcompensating by recanting more of the
 5 allegations than he should.” *Id.*⁴ The *Sandisk* court also correctly noted the “impropriety”
 6 of the defendants’ tactic, calling it “a ruse for putting a recantation in front of the district
 7 judge in the hope it will influence the decision on dismissal.” *Id.* at 1100. The court further
 8 concluded that “while a district judge is considering a motion to dismiss, there is a strong
 9 argument that defendants should never be submitting recanting declarations, and that courts
 10 should be striking any such declarations sight unseen.” *Id.* at 1101.

11 Yet another court in this Circuit rejected similar tactics in *In re Applied Micro*
 12 *Circuits Corp. Sec. Litig.*, 2002 WL 34716875, at *3 (S.D. Cal. Oct. 4, 2002). There,
 13 defense counsel submitted declarations of former employees for the express purpose of
 14 rebutting the complaints’ allegations, just as Defendants do here with Defendants’
 15 counsel’s declaration. *Id.* at *2. The court refused to consider the submissions in support
 16 of the defendants’ motion to dismiss “[b]ecause the declarations are extrinsic materials.”
 17 *Id.* at *3. In rejecting defendants’ tactic, the court noted that, like here, the “[p]laintiff
 18 provides a plausible explanation as to why sources are now contradicting themselves;
 19 [p]laintiff claims the change occurred after having been contacted by Defendants’
 20 attorneys.” *Id.* at *11. In denying the motion to dismiss, the court explained that the
 21 accuracy of the complaint’s allegations “boils down to an issue of credibility to be
 22 determined by a trier of fact”—i.e., **not** for resolution on the pleadings. *Id.*

23
 24
 25 ⁴ As a legal scholar recently noted, “[i]n a number of cases the declarations submitted
 26 by allegedly recanting CWs reflected only immaterial differences between the declarations
 27 and the material attributed to them in plaintiffs’ complaints.” CONFIDENTIAL
 28 WITNESSES INTERVIEWS IN SECURITIES LITIGATION, 96 N.C. L. Rev. 789, 806
 (2018) (citing cases). Important to this dispute, the author noted that “it seems likely that
 much of the recanting that does occur is the product of coercion by defendants and their
 counsel, and/or the fear of retaliation experienced by confidential witnesses.” *Id.* at 806-
 807.

At bottom, the issues raised by Defendants’ Motion boil down to credibility issues—whether Defendants’ counsel’s interpretation of the CWs’ clarifications or added context is accurate—which are factual disputes that cannot be properly determined on a motion to dismiss. Moreover, this Court should be skeptical of Defendants’ Motion because, as noted above, it is not uncommon for CWs to change their story once confronted by their former employer who may be able to exert pressure—financial or otherwise—to encourage those CWs to alter their accounts.

Defendants’ attempt to convert their motion to dismiss into a fact-based evidentiary battle is improper, and courts have repeatedly concluded that substituting a fact declaration’s assertions for a complaint’s factual allegations contradicts basic principles governing motions to dismiss. *See, e.g., id.* at *3 (“If the Court were to consider [the declarations], it would in fact convert this motion to dismiss into a motion for summary judgment, and the Court is not willing to do so.”); *In re Rayonair Sec. Litig.*, 2016 WL 3022149, at *1 (M.D. Fla. May 20, 2016) (explaining that the court is prohibited from “considering [a recanting witness] declaration without converting the motion to dismiss into a motion for summary judgment, a course of action neither party requests”).

2. Defendants’ Motion Violates the PSLRA Discovery Stay

In all actions arising under the PSLRA, “all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss.” 15 U.S.C. §78u-4(b)(3)(B). The stay continues until the “court has sustained the legal sufficiency of the complaint.” *SG Cowen Sec. Corp. v. U.S. Dist. Court for N. Dist. of Cal.*, 189 F.3d 909, 913 (9th Cir. 1999). The stay applies to both plaintiffs and defendants—there is no exception that allows the defendants in a PSLRA case to take discovery prior to a ruling on a motion to dismiss. *See In re AOL Time Warner, Inc. Sec. Litig.*, 2006 WL 1997704, at *2 (S.D.N.Y. July 13, 2006).

Here, Defendants are asking the Court to side-step the PSLRA and obtain discovery before the motion to dismiss has been decided. Although Defendants argue that obtaining CW affidavits does “not constitute traditional ‘discovery’ that would be subject to the

PSLRA stay,” Motion at 11 n. 4, they offer *no* support for this assertion. Nor could they, rather, courts facing such requests have consistently rejected attempts to contradict CW allegations at the motion to dismiss stage—finding that it is improper to engage in pre-motion to dismiss discovery even in cases where, unlike here, defendants obtained *sworn* statements from CWs recanting their statements prior to the discovery stay being lifted.⁵

For example, in *Cell Therapeutics*, defendants submitted declarations from three confidential witnesses and argued, as Defendants do here, that “their statements to [p]laintiffs’ investigators have been taken out of context, misrepresented or (in some cases) fabricated.” *In re Cell Therapeutics, Inc. Class Action Litig.*, 2010 WL 4791808, at *1 (W.D. Wash. Nov. 18, 2010). Defendants in that case requested that the court consider the confidential witness declarations in assessing the validity of the complaint, and also requested leave to depose the remaining confidential witnesses to determine if the statements in the complaint based on these witnesses had merit. *Id.* However, the court denied the request for pre-motion to dismiss discovery, noting that “neither the Federal Rules nor the [PSLRA] supports the practice” and ultimately considered the CW statements in the complaint when denying the motion to dismiss. *Id.* at *2; *see also, e.g., In re Par Pharm. Sec. Litig.*, 2009 WL 3234273, at *11-12 (D.N.J. Sept. 30, 2009) (striking a declaration from a supposedly recanting CW at the motion to dismiss stage while noting the PSLRA’s discovery stay).

Similarly, the Court here should deny Defendants’ Motion. Defendants’ Motion contravenes the PSLRA and is nothing more than an attempt to obtain discovery and improperly use it to undercut the Complaint’s allegations at the motion to dismiss stage. Defendants would have this Court allow them to take piecemeal, strategic discovery in order to obtain dismissal of the Complaint; yet not afford Plaintiffs any opportunity to take discovery from Defendants in an effort to buttress the Complaint’s well-pled allegations. This is patently prejudicial, contrary to the weight of authority, and should not be allowed.

⁵ Here, on the other hand, Defendants have not produced declarations from any CW. Instead, Defendants merely offer hearsay statements from an attorney based on what certain CWs supposedly told him.

B. Defendants’ Legal Authorities Are Inapposite

Defendants do not—because they cannot—cite to a *single* case from within this Circuit that suggests there is any relevant exception allowing the Court to engage in pre-motion to dismiss discovery. Indeed, the in-Circuit cases Defendants cite in their Motion highlight the impropriety of their request. For example, the court’s decision in *Bolling v. Gold*, 2015 WL 6870617 (W.D. Wash. Nov. 9, 2015) *was on a motion for summary judgment*, not a motion to dismiss, and thus does not apply to the facts here.⁶

Instead, Defendants’ attempt to obtain counsel and CW affidavits relies on *dicta* from a footnote in the Second Circuit’s unpublished opinion in *Campo v. Sears Holdings Corp.*, 371 F. App’x 212, 216 n.4 (2d Cir. 2010). *See* Motion at 11, 14-16. Defendants’ reliance on *Campo* is misplaced. The footnote Defendants’ claim supports their position is *dicta*—the Second Circuit noted that the plaintiff waived the argument, and thus, it was not an issue representing a case or controversy before that court—and courts in this circuit and elsewhere have roundly rejected similar attempts to rely on *Campo* to engage in discovery at the pleading stage. *See, e.g., Cell Therapeutics*, 2010 WL 4791808, at *2 (*Campo* “is *dicta*” and other courts “specifically reject” it); *Iron Workers Loc. 580 Joint Funds v. NVIDIA Corp.*, 522 F. Supp. 3d 660, 672 (N.D. Cal. 2021), *aff’d in part, rev’d in part and remanded sub nom. on other grounds E. Ohman J:or Fonder AB v. NVIDIA Corp.*, 81 F.4th 918 (9th Cir. 2023) (rejecting defendants’ argument, based on *Campo*, that the court should consider a CW’s recanting declaration at the motion to dismiss because “it is improper to resolve factual disputes concerning [CW’s] account at this stage”); *Rayonair*, 2016 WL 3022149, at *1 (“having carefully reviewed *Campo* and the related authority [d]efendants provided, the [c]ourt is unpersuaded that considering the [recanting] declaration or ordering

⁶ *Lifschitz v. NextWave Wireless Inc.*, 2011 WL 940918 (S.D. Cal. Mar. 16, 2011) is similarly unpersuasive. There, the court did not address any CW affidavit attempting to recant previous statements. Instead, the court found that the complaint failed to plead particularized facts giving rise to a strong inference of scienter because it merely “attempts to send the court on a “search mission through the allegations of twelve confidential witnesses without any particular directions.” *Id.* at *2. Thus, the court was skeptical of the CW allegations because they were added to “pages upon pages of allegations in the rear of the complaint” without any sort of particularity, as opposed to the accuracy of the CW statements. Thus, *NextWave Wireless* does not apply here.

1 that [witness] be deposed is the proper course of action at this time” because controlling
 2 authority “seems to prohibit the [c]ourt from considering [witness’s] declaration without
 3 converting the motion to dismiss into a motion for summary judgment”).

4 Defendants also rely heavily on *In re Millennial Media, Inc. Sec. Litig.*, 2015 WL
 5 3443918 (S.D.N.Y. May 29, 2015) in support of their Motion. But that case also did not
 6 address pre-motion to dismiss discovery or provide any support for the relief Defendants
 7 are seeking. Indeed, the holding in *Millennial Media* is not based on any controlling
 8 authority and goes well beyond the contours of the cases it relied on and all other existing
 9 precedent. The *Millennial Media* court itself acknowledged that it was “unaware of any
 10 case or ethics canon” supporting certain of its observations, and that its preference was “not
 11 one of law.” *Id.* at *13-14. Courts around the country, including within the Second Circuit,
 12 have routinely rejected *Millennial Media*, stating that it is “dicta, not followed by at least
 13 one other court in that district, ha[s] no precedential effect on this [c]ourt, and relate[s] only
 14 to the facts of that case.” *Dep’t of Treasury of N.J. v. Cliffs Nat. Res. Inc.*, 2015 WL
 15 6870110, at *4 n.5 (N.D. Ohio Nov. 6, 2015). Indeed, *Millennial Media* is “of questionable
 16 precedential value and, in any event, [is] entirely dependent on the facts of that case.” *In*
 17 *re Symbol Techs., Inc. Sec. Litig.*, 2017 WL 1233842, at *12 n.8 (E.D.N.Y. Mar. 31, 2017).

18 Notwithstanding, the facts of *Millennial Media* are readily distinguishable. There,
 19 the judge raised two concerns with the plaintiff’s investigation: (i) the plaintiff made no
 20 effort to confirm the accuracy of the statements used in the complaint; and (ii) the former
 21 employees did not know that their statements could appear in a complaint alleging
 22 securities fraud. *Millennial Media*, 2015 WL 3443918, at *6-14. Here, no such concerns are
 23 present. Lead Counsel and its investigators identified themselves at the outset of each
 24 interview as working for plaintiffs’ counsel in a class action securities litigation against
 25 Opendoor and set forth the purpose of the conversation. Christie Decl. at ¶¶12, 17, 22, 27.
 26 Lead Counsel and its investigators also told each CW that the information they provided
 27 would be used in a securities complaint against Opendoor. *Id.* at ¶¶13, 18, 23, 28-29. Then,
 28 Lead Counsel and its investigators confirmed the accuracy of the statements from three (3)

of the challenged CWs (CWs 2, 5, and 6) before filing the Complaint. *Id.* at ¶¶13, 18, 23. Lead Counsel and its investigators made substantial efforts to confirm the accuracy of the remaining CW, CW 8. However, CW 8 did not respond. Specifically, a Labaton Investigator left CW 8 a voicemail stating that she would be a CW in the Complaint and that Lead Counsel wanted to confirm her statements with her, however, CW 8 never returned the call. *Id.* at ¶28. Thereafter, Lead Counsel sent CW 8 a copy of the statements that would be attributed to her nearly a week before the Complaint was filed, and after filing, sent CW 8 a copy of the Complaint *Id.* at ¶¶29-30. CW 8 *never* reached out to Lead Counsel or its investigators to indicate any concerns whatsoever. *Id.* at ¶¶30-31.⁷

Moreover, and important to the dispute here, the court in *Millennial Media* “was provided with affidavits by the confidential witnesses themselves, not the hearsay of defendant’s attorneys.” *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, 2018 WL 3772675, at *12 (D.N.J. Aug. 8, 2018). No such affidavits are present here. Like in *Cognizant Tech.*, Defendants here submitted only an attorney declaration purporting to summarize conversations the attorney had with a CW. The *Cognizant Tech.* court refused to strike the CW allegations, noting in part that the attorney’s hearsay declaration was insufficient on its own to warrant striking allegations. *Id.* at *12-13.

Defendants’ reliance on *City of Livonia Employees’ Retirement System v. Boeing Co.* is similarly misplaced. In *Boeing*, the PSLRA discovery stay had been lifted and merits discovery had proceeded. 711 F.3d 754 (7th Cir. 2013). Moreover, as the Seventh Circuit noted, and Defendants conveniently ignore, the procedural challenge to the court’s use of evidence outside the four corners of the complaint “founder[ed] on the plaintiffs’ abandonment” of the CW allegations. *Id.* at 761. Likewise, Defendants’ reliance on the July 14, 2015 order in *In re Lumber Liquidators Holdings, Inc. Securities Litigation*, 4:13-cv-00157, (E.D.N.Y. July 14, 2015), ECF No. 91, is unpersuasive in that it is a clear outlier

⁷ Indeed, the Anhang Declaration admits that CW 8 received her statements before the Complaint was filed. Although CW 8 claims she did not have the opportunity to review the statements because she was on vacation, *see* Anhang Decl. at ¶30(b), the simple fact is CW 8 never once tried to contact Lead Counsel or its investigators after her vacation.

1 that: (1) is contrary to well-established law that this Court should not consider matters
 2 extraneous to the pleadings on the motion to dismiss, such as affidavits; (2) it is outside
 3 this circuit; (3) it is contrary to the weight of precedent outside this circuit; and (4) it does
 4 not even *mention* the PSLRA discovery stay or whether a court may properly consider
 5 extraneous evidence on a motion to dismiss. *See* Anhang Decl. Ex. 1. Furthermore, shortly
 6 after its order, the court there *upheld the complaint*, basing its decision in part on the
 7 confidential witnesses pled by the plaintiffs. *Kiken v. Lumber Liquidators Holdings, Inc.*
 8 155 F. Supp. 3d 593, 608 (E.D. Va. 2015).

9 **C. The “Anhang Declaration” and Defendants’ Motion are Highly**
 10 **Misleading**

11 Defendants’ Motion is purportedly based on the belief that there are “serious
 12 concerns raised regarding the CWs.” Motion at 17. Putting aside for the moment that
 13 Defendants’ submissions are inappropriate and may not be considered at the motion to
 14 dismiss stage, they are also highly misleading and do not change the Complaint’s well-pled
 15 allegations.

16 Most notably, Defendants argue that CW 6 did not state that Opendoor pricing
 17 analysts *had* to adjust both initial and *final* offers because CW 6 merely stated that pricing
 18 analysts *could* adjust *initial* offers. Motion at 10. However, the Complaint does not allege
 19 that CW 6 said anything about final offers. Quite the opposite. The Complaint clearly
 20 alleges that “CW 6 [stated] that the analysts and portfolio managers *could* use certain data
 21 to adjust the *initial* offer price.” ¶72 (emphasis added). Defendants appear to take issue
 22 with Plaintiffs’ Opposition Brief to Opendoor Defendants’ Motion to Dismiss (ECF No.
 23 55) (“Opp. Brief”), which cites to *several paragraphs* in the Complaint to argue that
 24 Opendoor’s pricing analysts adjusted the algorithm’s initial and final offers. Specifically,
 25 the Opposition Brief cites to ¶¶62-73 because those paragraphs contain CW allegations
 26 regarding human manipulation of initial offers (¶¶71-72) and final offers (¶¶62-70). *See*
 27 Opp. Brief at 2, 4. Nowhere does the Complaint or Opposition Brief suggest CW 6 made
 28 any statements about the Company’s final offers.

Moreover, none of the CWs recanted their statements, as Defendants only point to minor inconsistencies and clarifications that do not alter the Complaint's theory of securities law violations. For example, the Complaint alleges that Opendoor's pricing algorithm was inaccurate and, as a result, Opendoor relied on a human-driven process for pricing offers. As support, the Complaint alleges that CW 2 stated that her manager told her not to look at the algorithm because it was not accurate and would bias her judgment when making offers. *See* ¶64. Defendants' Motion now argues that this is a mischaracterization because CW 2 supposedly told Defendants' counsel that her manager told her to look at the algorithm but do not anchor to it. *See* Anhang Decl. at ¶14(b). However, this is a distinction without a difference. Whether CW 2's manager told her to ignore the algorithm because it would bias her judgment, or whether her manager told her to look at it but don't anchor to it because it was inaccurate and would bias her judgment, is of no moment. The undisputed fact is that CW 2's allegations demonstrate that the algorithm was not accurate—despite Defendants' public statements touting the accuracy of the algorithm—which is a key aspect of the Complaint's theory.

Finally, the Anhang Declaration and Defendants' Motion should be given no weight because Opendoor pressured its former employees into cooperating. For example, based on Lead Counsel's communications with counsel for CW 1, it appears that Defendants pressured the CWs into speaking by claiming that their employment contracts with Opendoor required them to cooperate with Defendants' counsel in this securities case. *Christie Decl.* at ¶32. Once Defense counsel was able to get the CWs to cooperate, they simply asked the CWs leading questions to suit their objectives, such as asking CW 2 "you wouldn't have said it was 'never' accurate?" *See* Anhang Decl. at ¶14(a).

Thus, Defendants' Motion—which merely addresses purported minor discrepancies or clarifications that do not change the Complaint's allegations—does not even create any legitimate credibility issues. Defendants' quibbles over minor distinctions should be rejected as premature and improper at the motion to dismiss stage. Defendants will have

the opportunity to challenge the CW statements through discovery after the Court sustains the Complaint.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion and grant such other relief as the Court may deem proper.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and transmittal of a Notice of Service of Electronic Filing to the individuals registered with CM/ECF.

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